

# **THE RIGHT OF THE INTERNATIONAL COURT OF JUSTICE TO REFUSE TO RENDER AN ADVISORY OPINION**

In View of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian  
Territory* Opinion of 9 July 2004

The Discretionary Power of the International Court of Justice

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## 1 Introduction

The International Court of Justice,<sup>1</sup> is the principal judicial organ of the United Nations (UN). Its function is to decide cases on the basis of international law, and to give advisory opinions when requested to do so by an authorized body or agency. However, the jurisdiction of the Court is not obligatory in the sense that it is bound to act when a request is put forward.

The topic of this thesis is the discretion of the Court in its advisory proceedings. In this essay I will give an analysis of the possibility for the ICJ to decline to give an advisory opinion. This discretion is guided by the Court's character as a principal organ of the United Nations, and the Courts judicial character when giving the advisory opinions. The discretionary power of the Court will, in particular, be analysed in view of the recent case concerning the *Legal Consequences of the Construction of a wall in the Occupied Palestinian territory*, given by the ICJ on July 9, 2004.<sup>2</sup>

In chapter two I will give an introduction to the history and function of the International Court of Justice, focusing particularly on advisory opinions.

Chapter three will contain a summary of the *Wall* opinion and the arguments put forward in this case when contending that the Court should exercise its discretion and refuse to give an opinion. These arguments will be discussed and analysed in chapter four, in view of relevant statements and previous practice of the ICJ.

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<sup>1</sup> Also referred to as the Court, the International Court or the ICJ.

<sup>2</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion 9 July 2004 (ICJ Reports 2004, p 136). Also referred to in this essay as the *Wall* case or the *Wall* opinion.

The effect of advisory opinions and in particular the effect of the *Wall* opinion will be pointed out in chapter five. Finally, in chapter six I will look at the possibilities of extending the jurisdiction of the International Court.

## **2 The International Court of Justice**

### **2.1 The History and Function of the ICJ**

#### **2.1.1 International Dispute Settlement Procedures**

Article 33 of the United Nations Charter lists the following methods for the peaceful settlement of disputes between States: negotiation, mediation, conciliation, arbitration, judicial settlement, and the resort to regional agencies or arrangements, to which good offices should also be added. Some of these methods involve appealing to third parties. Mediation for example places the disputing parties in a position in which they can themselves resolve their dispute thanks to the influence of a third party. Arbitration goes further, in the sense that the dispute is in fact submitted to an impartial third party, who awards a decision so that a binding settlement can be achieved. The same is true for judicial settlement, except that, regarding procedural matters, a court is subject to stricter rules than an arbitral tribunal.<sup>3</sup> Historically speaking, mediation and arbitration preceded judicial settlement. The former was known in ancient India and in the Islamic world, whilst numerous examples of the latter are to be found in ancient Greece and, China, among the Arabian tribes, in the early Islamic world and in maritime customary law in medieval Europe.<sup>4</sup>

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<sup>3</sup> Shaw, M, *International Law* (Cambridge: Cambridge University Press 2003) p 916.

<sup>4</sup> *The history and function of the International Court of Justice*, chapter 1, p 1 [online]. Based on a booklet prepared on occasion of the fiftieth anniversary of the ICJ (1946-1996): <http://www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookframepage.htm>

The origins of modern arbitration are recognized as dating from the so-called Jay Treaty of 1794,<sup>5</sup> between the United States and Great Britain, which settled a number of questions resulting from the American War of Independence. The Jay Treaty led to a general interest in the possibilities of using legal and judicial techniques as a method of resolving certain types of international conflicts.<sup>6</sup>

A major development in the history of international adjudication occurred in the *Alabama Claims* case of 1872. Under the Treaty of Washington of 1871,<sup>7</sup> the United States and the United Kingdom had agreed to submit to arbitration claims by the US for alleged breaches of neutrality by the UK during the American civil war. This arbitration tribunal was to consist of five members: Heads of State of the United States, United Kingdom, Brazil, Italy and Switzerland. The US and UK agreed to certain rules governing the duties of neutral governments to be applied by the tribunal.<sup>8</sup>

The proceedings in the *Alabama Claims* case served as a demonstration of the effectiveness of arbitration in the settlement of a major dispute, and resulted in the Hague Conferences of 1899 and 1907.<sup>9</sup> Along with other matters, these conferences attempted to find a way of repairing a number of obvious weaknesses in the system and practice of international arbitration, as it had been developing during the nineteenth century. All the instances of international arbitration up to this time had been marked by acute political difficulties in reaching an agreement on the composition and procedure of the arbitral tribunal and on fixing the points on which it was to be asked to decide. This was because no standing arbitral machinery and no clearly accepted concepts of international arbitral procedure

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<sup>5</sup> Jay Treaty, 19 November, 1794.

<sup>6</sup> Rosenne, S., *Rosenne's The World Court. What It is and how It works* (Leyden: Nijhoff Publishers 2003) pp.1-2.

<sup>7</sup> Treaty of Washington, Washington D.C. 8 May, 1871.

<sup>8</sup> *History and function of the ICJ*, supra note 4, chapter 1, p 1.

<sup>9</sup> Rosenne, supra note 6.

existed.<sup>10</sup> The idea of creating a world court for the international community developed as a result of the atmosphere engendered by the Hague Conferences, and in 1900 the Permanent Court of Arbitration was established, beginning to operate in 1902.<sup>11</sup> This marked an important step forward in the consolidation of an international legal system.

However, no lasting steps were taken until after the end of the First World War. One of the reasons for the difficulties confronting all the earlier attempts to establish permanent international tribunals of general jurisdiction was the absence of any central political administration for the international community. This changed with the establishment of the League of Nations by the Peace Treaties of 1919.<sup>12</sup>

### 2.1.2 The Permanent Court of International Justice

Article 14 of the Covenant of the League of Nations gave the Council of the League responsibility for formulating plans for the establishment of a Permanent Court of International Justice.<sup>13</sup> Such a court was to be competent not only to hear and determine any dispute of an international character submitted to it by the disputing parties, but also to give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.<sup>14</sup> The PCIJ was intended as a way to prevent outbreaks of violence by enabling easily accessible methods of dispute settlement through an available legal and organisational framework.<sup>15</sup>

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<sup>10</sup> Rosenne, *supra* note 6.

<sup>11</sup> *History and function of the ICJ*, *supra* note 4, chapter 1, p 3.

<sup>12</sup> Peace Treaties, Paris Peace Conference, 18 January 1919 – 21 January 1920.

<sup>13</sup> Hereafter referred to as the PCIJ or the Permanent Court.

<sup>14</sup> *History and function of the ICJ*, *supra* note 4, chapter 1, p 4.

<sup>15</sup> Rosenne, S., *The Law and Practice of the International Court, 1920-1996, Volume II, Jurisdiction* (The Hague: Kluwer Law International 1997).



Despite Article 14 of the Covenant, the PCIJ, which was in existence from 1922 until the dissolution of the League on 18 April 1946, was not formally an organ of the League. The fact that a State was a member of the League did not automatically make it a party to the Statute of the Court.<sup>16</sup>

Between 1922 and 1940 the PCIJ dealt with 32 contentious cases between States and gave 27 advisory opinions.<sup>17</sup> The Court helped resolve some serious international disputes, many consequences of the First World War, and in addition made a significant contribution to the development of international law.<sup>18</sup> Some of the advisory opinions the Permanent Court dealt with were, amongst others, the case concerning *German settlers in Poland*,<sup>19</sup> the *Status of Eastern Carelia* case,<sup>20</sup> and the *Greco-Bulgarian "Communities"* case.<sup>21</sup>

The PCIJ was dissolved after the Second World War. It was decided at the San Francisco Conference in April 1945 to create an entirely new court, which would be a principal judicial organ of the United Nations, with the Statute annexed to and forming part of the United Nations Charter.<sup>22</sup> This new world court was named the International Court of Justice.<sup>23</sup>

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<sup>16</sup> Rosenne, *supra* note 6, p 10.

<sup>17</sup> *History and function of the ICJ*, *supra* note 4, p 5.

<sup>18</sup> *Ibid*, p 13 and Rosenne, *supra* note 6, p 5.

<sup>19</sup> *Questions relating to Settlers of German origin in Poland*, Advisory Opinion, No. 5 (PCIJ, Ser. B., No. 5, 1923).

<sup>20</sup> *Status of Eastern Carelia*, Advisory Opinion No. 5 (PCIJ, Ser. B., No. 5, 1923).

<sup>21</sup> *The Greco-Bulgarian "Communities"* Advisory Opinion (PCIJ, Ser. B., No. 17, 1930).

<sup>22</sup> Charter of the United Nations, 26 June 1945. The Statute of the Court is an integral part of the Charter.

<sup>23</sup> *History and Function of the ICJ*, *supra* note 4, p 7.

### 2.1.3 The ICJ as the Principal Judicial Organ of the UN

Today, there is a specific organic link established between the ICJ and the UN. This differs from the Permanent Court - League connection.

Article 7 of the United Nations Charter establishes the principal organs of the United Nations. These are the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council,<sup>24</sup> the International Court of Justice, and the Secretariat. Article 92 of the Charter states that the Court shall be the principal judicial organ of the United Nations, and that it shall function in accordance with the annexed Statute, which is based upon the statute of the Permanent Court. It is stated in Article 1 of the Statute that the Court established by the Charter as the principal judicial organ of the United Nations shall function in accordance with the provisions of the Statute. These provisions contain the general arrangement determining the position of the Court within the organization of the UN.<sup>25</sup>

The constitutional integration of the present Court with the United Nations is distinct from the Permanent Court which was not expressly made an organ of the League of Nations, and whose Statute was separate from the Covenant.<sup>26</sup> However, in essence, the ICJ is a continuation of the Permanent Court, with virtually the same statute and jurisdiction, and with a continuing line of cases, no distinction being made between those decided by the PCIJ and those decided currently by the ICJ.<sup>27</sup>

The ambiguous characteristic of the relations between the League of Nations and the Permanent Court has now been replaced by clarity. The Statute of the Court is no longer a separate international treaty, but an integral part of the Charter. Consequently every member of the United Nations is thus *ipso facto* a party to the Statute of the Court. This

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<sup>24</sup> The Trusteeship Council is now defunct.

<sup>25</sup> Statute of the Court, Article 1.

<sup>26</sup> Pratap, D., *The Advisory Function of the International Court* (Oxford: Clarendon Press 1972) p 145.

<sup>27</sup> Shaw, *supra* note 3, p 960 and Brownlie, I., *Principles of Public International Law* (Oxford: Oxford University Press 1996) p 678.

emphasizes the quality and status of the Court as the principal judicial organ of the United Nations.<sup>28</sup>

#### 2.1.4 The Function of the ICJ

The most important task of the ICJ is to decide disputes between States in accordance with the provisions of its Statute. However, this function is not limited to disputes between States which are members of the United Nations. Non-member States can also be parties in cases before the Court, as applicant or as respondent.<sup>29</sup> In addition, the Court supplies judicial guidance and support for the work of other United Nations organs and for the autonomous specialized agencies through the provision of advisory opinions.<sup>30</sup>

The establishment of the Court as one of the principal judicial organs of the United Nations means that it exists on a par with the other principal organs. It is neither in a position of superiority nor one of inferiority in relation to the others. One consequence of this is that the Court is not a general “constitutional Court” of the UN. There is no duty on any organ of the UN, any State or on any person to seek its opinion when a legal question, including a question of the interpretation of an instrument such as the Charter or the Rules of Procedure, arises in the course of the activities of an organ. Nor does the Court have the general power of judicial review to determine the “constitutionality” of the actions or decisions of any other organ or subdivision of the United Nations. It can only act in response to a contentious or advisory case duly brought before it.<sup>31</sup>

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<sup>28</sup> Rosenne, *supra* note 6, p 15.

<sup>29</sup> Statute of the Court, Article 35.

<sup>30</sup> Statute of the Court, Chapter IV, and Rosenne, *supra* note 6, p 23.

<sup>31</sup> Rosenne, *supra* note 6, pp 28-29.

The judgement of the Court in a contentious case is final and without appeal, and is only binding on the parties in respect of that particular case.<sup>32</sup>

#### 2.1.5 Composition of the Court

The ICJ is composed of fifteen members.<sup>33</sup> The members of the Court are elected by the Member States of the UN and other States that are parties to the Statute of the ICJ.<sup>34</sup> Voting takes place both in the General Assembly and the Security Council.<sup>35</sup> The Court is not composed of representatives of governments, unlike most other organs of international organizations. Members of the Court are independent judges and required to exercise their powers impartially and conscientiously.<sup>36</sup>

#### 2.1.6 The Jurisdiction of the ICJ

The ICJ is a judicial institution that decides cases on the basis of the existing international law at the date of the decision. It is not a legislative organ and can thus, not formally create law. The Court has emphasised that:

*“it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.”*<sup>37</sup>

The jurisdiction of the ICJ falls into two distinct parts: its capacity to decide disputes between states, and its capacity to give advisory opinions when requested to do so by

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<sup>32</sup> Statute of the Court, Article 59 and 60. See also UN Charter, Article 94(1) and (2) and Rosenne, *supra* note 6, p 34.

<sup>33</sup> Statute of the Court, Article 3(1). See also Rules of Court, 14 April 1978, Part I, section A.

<sup>34</sup> Statute of the Court, Article 4.

<sup>35</sup> Statute of the Court, Article 8.

<sup>36</sup> *History and function of the ICJ*, *supra* note 4, chapter 2, p 2.

<sup>37</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion 8 July 1996 (ICJ Reports 1996, pp 226-227), cited in Shaw, *supra* note 3, p 967.

particular qualified entities. The latter is the topic of this essay, but I will first give a general introduction to the Court's contentious jurisdiction when deciding disputes between States.

#### 2.1.7 Contentious Jurisdiction

According to article 34 of the Statute, only States may be parties in cases before the Court. Therefore, private persons and international organizations are prohibited from resolving disputes in contentious cases through the ICJ.

The Court is open to all states that are parties to the Statute. The non-members of the UN may become a party to the Statute on conditions determined by the General Assembly upon the recommendation of the Security Council.<sup>38</sup>

Article 36(1) of its Statute gives the Court jurisdiction in all cases referred to it by parties, and regarding all matters specially provided for in the UN Charter or in treaties or conventions in force.

The jurisdiction of the Court is based on the consent of the parties. This is a consequence of a general principle in international law according to which no state is obliged to submit any dispute with another state, or to give an account of itself to any international tribunal. This principle is reflected in Article 36 of the Statute, and rests on international practice in the settlement of disputes and is a corollary of the sovereign equality of states.<sup>39</sup>

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<sup>38</sup> UN Charter, Article 93(2).

<sup>39</sup> Rosenne, *supra* note 15, p 563 and Brownlie, *supra* note 27, p 681.

According to the UN Charter Article 94, States are obliged to comply with the decisions of the Court in contentious cases. However, Article 59 of the Statute provides that only parties in the particular case before the Court are bound by the decision.

## 2.2 Advisory Opinions

### 2.2.1 History and Purpose of the Advisory Function

In addition to having the capacity to decide disputes between states, the ICJ is also, as stated above, entitled to give advisory opinions. The advisory jurisdiction of the Court had its starting-point in Article 14 of the Covenant of the League of Nations. Similarly, the ICJ was given the jurisdiction to provide UN organs with legal opinions upon their request.

The jurisdiction to give advisory opinions was given to the Court for several reasons; its purpose was to assist the organs and agencies in deciding on the course of action they should follow. It might also furnish them with legal advice and guidance in respect of disputes submitted to it and for action in all future cases and situations.<sup>40</sup> In addition it can be argued that the advisory jurisdiction of the Court might simply be one way of gaining time and avoiding the necessity for an immediate decision, or may even help to eliminate further controversy over the legal aspects of a dispute or by having a calming effect on the parties.<sup>41</sup> It has been noted that the value of the advisory function can, in international relations, sometimes be more important than judgements, as the persuasive nature of advice is frequently superior to force and coercion.<sup>42</sup>

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<sup>40</sup> Pratap, *supra* note 26, p 5.

<sup>41</sup> Amr, M., *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations* (The Hague: Kluwer Law International 2003) p 48.

<sup>42</sup> Hudson, M., *The Permanent Court of International Justice 1920-1942* (New York: Macmillan 1943) p 524.

### 2.2.2 The Advisory Jurisdiction of the ICJ

The ICJ has the authority to give advisory opinions by virtue of Article 65(1) of its Statute;

*“The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.”*

In addition, article 96(2) of the UN Charter empowers the General Assembly and Security Council to request such an opinion, and provides that on the authorization of the General Assembly a similar power may be given to other organs or specialized agencies.<sup>43</sup>

Consequently, three conditions must be satisfied in order to find the jurisdiction of the Court when a request for an advisory opinion is submitted to by a specialized agency: the agency requesting the opinion must be duly authorized, under the Charter, to request opinions from the Court; the opinion requested must be regarding a legal question; and this question must be one arising within the scope of the activities of the requesting agency. At present, there are 22 organs and agencies that have the right to ask the Court for an advisory opinion on a legal question. These are amongst others the General Assembly, Security Council, the World Health Organization (WHO), the International Labour Organization (ILO) and the UN Educational, Scientific and Cultural Organization (UNESCO).<sup>44</sup>

The precise circumstances in which each agency may avail itself of the Court’s advisory jurisdiction are specified either in the organisation or agency’s constitutive act, constitution or statute.<sup>45</sup> Advisory opinions may be requested relating to the interpretation of these texts or of the Charter of the United Nations. It may concern disagreements between two or more organs or agencies *inter se*, an organ or agency and one or more of its staff members, an

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<sup>43</sup> Brownlie, *supra* note 27, p 691 and Rosenne, *supra* note 15, pp 682-686.

<sup>44</sup> See index in chapter 8.1 for an overview of organs and agencies entitled to ask the ICJ for an advisory opinion.

<sup>45</sup> *History and function of the ICJ*, *supra* note 4, chapter 6, p 1.

organ or agency and one or more of its member States, or two or more States Members of the same organ or agency *inter se*.

However, there is no obligation on any organ of the UN to seek the Court's opinion when a legal question arises in the course of the activities.

### 2.2.3 Advisory Opinions vs. Contentious cases

The main difference between advisory opinions and contentious cases is that in advisory matters there are technically no 'parties' and no binding 'decision'. The role of individual States in advisory cases is essentially to supply information.<sup>46</sup>

For access to the advisory competence, the concurrence of other States is required, expressed in the form of a resolution requesting the Court to give its opinion. In contentious jurisdiction however, a State can go to the Court of its own accord.<sup>47</sup>

However, the procedure regarding advisory opinions is based on the provisions in the Statute of the Court and Rules of Court relating to contentious proceedings, to the extent that it recognizes them to be applicable.<sup>48</sup>

As mentioned in section 2.2.1, the purpose of the advisory opinion is to assist the political organs in settling disputes and to provide authoritative guidance on points of law arising from the function of organs and specialized agencies.<sup>49</sup> Unlike contentious cases, advisory opinions are not meant to settle, at least directly, inter-state disputes, but rather to:

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<sup>46</sup> Rosenne, *supra* note 6, p 87.

<sup>47</sup> *Ibid*.

<sup>48</sup> Statute of the Court, Article 68.

<sup>49</sup> Brownlie, *supra* note 27, p 691.



*“offer legal advice to the organs and institutions requesting the opinion”.*<sup>50</sup>

Accordingly, the fact that the question put to the Court does not relate to a specific dispute does not affect the competence of the Court, nor does it matter that the question posed is abstract in nature. The Court will not regard either the origins or the political history of the request, nor the distribution of votes with regard to the relevant resolution. The fact that any answer given by the Court might become a factor in relation to the subject matter of the request in other fora is also irrelevant in determining the appropriate response of the Court to the request for the advisory opinion.<sup>51</sup>

#### 2.2.4 Discretion

The discretionary power of the Court, founded on article 65(1) of the Statute, implies that once it is established that the Court is competent to answer a request, it is not obliged to do so:

*“(…) the Court is only authorized, not obliged, to give advisory opinions. The Court may, for reasons completely within its discretion, refuse to give an advisory opinion, requested in conformity with the Charter”.*<sup>52</sup>

This means that the Court has the right to refuse an opinion if it considers that there are reasons which make it improper to accede to the request. In the *Peace Treaties* advisory opinion the Court affirmed the permissive wording of Article 65 of the Statute when it states that:

*“Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request”.*<sup>53</sup>

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<sup>50</sup> ICJ Reports 1996 pp 226, 236, cited in Shaw, *supra* note 3, p 1001.

<sup>51</sup> Shaw, *supra* note 3, pp 1000-1001.

<sup>52</sup> Kelsen, H., *The Law of the United Nations: a critical analysis of its fundamental problems* (London: Steven & Sons 1950) p 549, cited in Pratap, *supra* note 26, p 145.

This discretion has been repeatedly recognized in several cases before the Court.<sup>54</sup>

Nevertheless the Court has declared that as a principal organ of the United Nations system, it is duty bound to cooperate with the other organs and consequently obliged in principle to answer requests.<sup>55</sup> Accordingly, it has stated on a number of occasions that only “compelling reasons” could oblige it to forego its duty to reply. The main source of these compelling reasons might be the other side of the Court’s character; for not only is the Court an organ of the United Nations, but it is also a judicial organ.

The permissive wording of Article 65 gives the Court a general discretion whether or not to answer the question put to it. In addition, Article 68 of the Statute provides that in the exercise of its advisory functions the Court shall further be guided by the provisions of the Statute which apply in contentious cases “*to the extent to which it recognizes them to be applicable*”.<sup>56</sup>

In the history of the present Court, there has been no refusal, based on the discretionary power of the Court, to act upon a request for advisory opinion. In the case concerning the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*,<sup>57</sup> the refusal to give the World Health Organisation the advisory opinion requested by it, was justified by the Court’s lack of jurisdiction in that case, and not because “compelling reasons” were present.

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<sup>53</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, 1<sup>st</sup> Phase, Advisory Opinion 30 March 1950 (ICJ Reports 1950 p 65) p 72.

<sup>54</sup> See as example *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion 28 May 1951 (ICJ Reports 1951, p 15), and *Certain Expenses of the United Nations*, Advisory Opinion 20 July 1962 (ICJ Reports 1962 p 151).

<sup>55</sup> ICJ Reports 1950 p 65, and Keith, K.J., *The Extent of the Advisory Jurisdiction of the International Court of Justice* (Leyden: A.W Sijthoff 1971) p 236.

<sup>56</sup> Statute of the Court, Article 68.

<sup>57</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion 8 July 1996 (ICJ Reports 1996, p 66).

The PCIJ took the view on only one occasion that it could not reply to a question put to it, regarding the very particular circumstances of the case, including that the question directly concerned an already existing dispute, and one of the States party to this dispute (neither a party to the Statute of the PCIJ nor a Member of the League of Nations), objected to the proceedings of the second case and refused to take part in any way.<sup>58</sup>

### **3 The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory case**

#### **3.1 Introduction**

On December 8, 2003, the General Assembly of the United Nations put forward a request for an advisory opinion from the ICJ. The question on which the Court was to answer in its advisory opinion was set out in resolution ES-10/14 adopted by the General Assembly at its Tenth Emergency Special Session.<sup>59</sup> The ICJ was requested to render an advisory opinion on the following question:

*“What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?”*

The Court gave the advisory opinion on July 9, 2004. It came to the conclusion, by fourteen votes to one, that the construction of the wall violated international law.<sup>60</sup> Israel was under an obligation to dismantle it, and pay compensation to Palestinians who had suffered financial or property losses as a result of its construction. States should not recognize the

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<sup>58</sup> *Status of Eastern Carelia*, 1923.07.23: Advisory Opinion No. 5 (PCIJ, Ser. B., No. 5, 1923).

<sup>59</sup> GA Res. ES-10/14 of 8 December 2003.

<sup>60</sup> See Declaration of Judge Burgenthal in ICJ Reports 2004 p 136.

barrier as legitimate and were under an obligation not to render aid or assistance in maintaining the situation created by the construction of the wall. Furthermore, the UN should act to implement the Court's decision.

On July 21 2004, the General Assembly of the UN agreed with the ICJ opinion, by a vote of 150 – 6 with ten abstentions.<sup>61</sup>

Prior to delivering the advisory opinion, the Court received 50 written statements from various States and organizations. Among these written statements were arguments claiming that the Court should decline to exercise its jurisdiction, referring *inter alia* to the Court's discretionary power in Article 65 of the Charter.<sup>62</sup>

Such a statement was also given by Norway. The Norwegian view on the question whether or not the ICJ should render an advisory opinion in this matter, was that such an advisory opinion would not contribute to resolving the political differences between the parties in the dispute. As far as Norway was concerned, an advisory opinion would not help the efforts of the two parties to re-launch a political dialogue and could advance the possibilities for a negotiated settlement. Consequently, Norway abstained from voting on resolution ES-10/14. So did 74 other countries, while 90 countries supported the resolution and 8 countries opposed it.<sup>63</sup>

I will in the following section summarize the arguments contending that the Court should exercise its discretion and refuse to render the advisory opinion concerning the wall built

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<sup>61</sup> GA Res. ES-10/15 of 20 July 2004. See table 2 in chapter 8.3 for an overview of which States that voted against or abstained from voting on this resolution.

<sup>62</sup> See table 1 in chapter 8.2 for an overview of which States and organisations that gave written statements.

<sup>63</sup> Official document from Rolf Einar Fife, on behalf of the Norwegian Royal Ministry of Foreign Affairs, January 30, 2004.

on occupied Palestinian territory. The ICJ examined these arguments in detail in its advisory opinion.<sup>64</sup>

### 3.2 Summary of the Arguments Contending that the ICJ should Exercise its Discretion and Refuse to give the Advisory Opinion

#### 3.2.1 Determining the Jurisdiction of the Court

Before the Court can decide whether to use its discretion and refuse to render an advisory opinion, it has to determine its jurisdiction.<sup>65</sup>

The Court found that the General Assembly had the right to request the advisory opinion by virtue of Article 65(1) of its Statute and Article 96(1) of the UN Charter, which specifically authorizes the General Assembly to request advisory opinions. Consequently the Court rejected the argument that it had no jurisdiction in the matter of the wall.<sup>66</sup>

#### 3.2.2 Lack of Consent

It was argued that the Court could not exercise its jurisdiction in the present case because the request concerned a contentious matter between Israel and Palestine, in which Israel had not given consent to the exercise of that jurisdiction.<sup>67</sup>

However, the Court stated that; one party's lack of consent to the proceedings does not necessarily have a bearing on the Court's jurisdiction.<sup>68</sup> The Court referred to the advisory opinion concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, where it was stated that while consent being the basis of the Court's

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<sup>64</sup> ICJ Reports 2004 p 136, paras. 46-65.

<sup>65</sup> ICJ Reports 1996 p 232, para. 10.

<sup>66</sup> ICJ Reports 2004 p 136, paras. 14-42.

<sup>67</sup> Ibid, para. 46.

<sup>68</sup> Ibid, para. 47.

jurisdiction in contentious proceedings, it is quite different in regard to advisory proceedings:

*“The Court’s reply is only of an advisory character: as such, it has no binding force”.*<sup>69</sup>

In addition, due to the responsibilities of the UN in matters relating to peace and security and the permanent responsibility of the General Assembly regarding the question of Palestine until its final resolution, the Court decided that the “*radically divergent views*” of Israel and Palestinians regarding the wall might not be regarded as solely a bilateral matter. Lack of consent to the proceedings on Israel’s part therefore was not sufficient to convince the Court to decline to issue the advisory opinion.<sup>70</sup>

### 3.2.3 Political Implications

The Court likewise rejected the argument that it should decline to give an advisory opinion because of the possible political consequences for a future negotiated solution to the conflict. The Court had considered this argument several times before, and it repeated that many legal questions have political aspects, but these aspects do not deprive the Court of its competence.<sup>71</sup>

### 3.2.4 Lack of Information

It was also contended in the *Wall* opinion that the question put to the Court only raised one aspect of the conflict between Israel and Palestine, and that more information was needed for the Court to address the question properly in the proceedings.<sup>72</sup>

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<sup>69</sup> ICJ Reports 1950 p 71, cited in ICJ Reports 2004 para. 47.

<sup>70</sup> ICJ Reports 2004 p 136, paras. 46-50.

<sup>71</sup> Ibid, paras. 51-53.

<sup>72</sup> Ibid, para. 55.

The Court dismissed this argument as it found that it had “*sufficient information and evidence*” as the UN secretary general’s office had submitted several documents containing:

*“not only detailed information on the route of the wall but also on its humanitarian and socio-economic impact on the Palestinian population.”*<sup>73</sup>

In addition, numerous written statements from other participants were submitted to the Court that contained relevant information in order to answer the question put by the General Assembly. Although Israel’s written statement was limited to issues of jurisdiction and judicial propriety, it contained security concerns and was accompanied by annexes that gave more detail to the security argument. Documents concerning these matters were also made available to the public.<sup>74</sup>

### 3.2.5 Lack of Useful Purpose

A further argument was that an advisory opinion given by the ICJ on this question would lack any useful purpose.<sup>75</sup>

As per long-standing jurisprudence, the Court said, the purpose of advisory opinions is to furnish the requesting organs with “*the elements of law necessary for them in their action*”.<sup>76</sup> The Court recalled what was stated on this issue in its Opinion on the *Legality of the Threat or Use of Nuclear Weapons*:

*“(…) it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly.(…) The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs”.*<sup>77</sup>

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<sup>73</sup> ICJ Reports 2004 p 136, paras. 57-58.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid, para. 59.

<sup>76</sup> Ibid, para. 60.

<sup>77</sup> ICJ Reports 1996 p 237, cited in ICJ Reports 2004 p 136, para 61.

This statement was found by the Court to be equally relevant in the present proceedings, and consequently, the Court could not decline to answer the question based on the grounds that its opinion would lack any useful purpose.<sup>78</sup>

### 3.2.6 Propriety of Giving the Advisory Opinion

The Court further dismissed the contention that Palestine was responsible for acts of violence and could not seek a remedy from the Court for a situation resulting from its own wrongdoing. This was because the advisory opinion is given to the General Assembly and not to a specific State or entity.<sup>79</sup>

## 4 The Right of the International Court to Refuse to Render an Advisory Opinion

### 4.1 Introduction

The combined case-law of the Permanent Court and the present Court indicates that two general principles and the interplay between them have been developed to guide the Court in the exercise of its discretion.<sup>80</sup>

The first is the principle originally laid down in the answer given to the Council of the League of Nations by the Permanent Court in the *Eastern Carelia* advisory opinion, that the Court, being a Court of Justice cannot, even in giving advisory opinions, depart from the essential rules guiding its activity as a Court.<sup>81</sup>

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<sup>78</sup> ICJ Reports 2004 p 136, para. 62.

<sup>79</sup> Ibid, para. 63.

<sup>80</sup> Rosenne, *supra* note 15, p 1013.

<sup>81</sup> PCIJ, Ser. B., No. 5, 1923, p. 29.



The second, which is unique to the present Court, is that since the Court is a principal body of the United Nations, it is under a duty to cooperate with other bodies, and therefore, a request for an advisory opinion should not be refused.<sup>82</sup>

The Court has in principle stated that it should not refuse to give a requested opinion unless there are “compelling reasons” for such a refusal. This view has been confirmed in several cases such as the *Peace Treaties* case,<sup>83</sup> the *UNESCO* case,<sup>84</sup> the *Expenses* case,<sup>85</sup> the *Namibia* case,<sup>86</sup> the *Western Sahara* case,<sup>87</sup> the *Legality of the Threat or Use of Nuclear Weapons* case,<sup>88</sup> and in the *Cumaraswamy* case.<sup>89</sup> In all these cases the Court made it clear that it is strongly inclined towards answering a request for an opinion, and that it can refuse to give an opinion only if there are ‘compelling reasons’. The Court did not, however, identify in any of these cases what those reasons might be.<sup>90</sup>

I will in the following sections discuss how the arguments put forward in the *Wall* opinion relate to the exercise of the Court’s discretion when deciding if it should refuse to render an advisory opinion. These arguments involved a contention that there existed “compelling reasons” for the Court to give an advisory opinion.

The arguments in the *Wall* opinion involved (i) lack of consent from a State (Israel) to the Courts jurisdiction, (ii) lack of requisite facts and evidence, (iii) lack of useful purpose, (iv)

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<sup>82</sup> Rosenne, *supra* note 15, p 1013.

<sup>83</sup> ICJ Reports 1950, p 72.

<sup>84</sup> ICJ Reports 1956, pp 86-87.

<sup>85</sup> ICJ Reports 1962, pp 155-156.

<sup>86</sup> ICJ Reports 1971, p 27.

<sup>87</sup> ICJ Reports 1975, p 21.

<sup>88</sup> ICJ Reports 1996, pp 235-236.

<sup>89</sup> ICJ Reports 1999, p 79.

<sup>90</sup> Amr, *supra* note 41, p 108.

complication of negotiations between Israel and Palestine and (v) whether the propriety of giving the opinion should lead the Court to refuse to render the opinion.

Because the first argument, lack of consent, has been subject to a wide discussion in several previous cases before the Court, I have concentrated most of the analysis on this argument.

## 4.2 Lack of Consent

### 4.2.1 Discretion based on the Court's Judicial Character

The first argument the Court examined in the *Wall* opinion was the lack of consent from Israel to the advisory proceedings and the Court's jurisdiction.<sup>91</sup>

Several participants in the proceedings raised the argument that the request concerned a contentious matter between two States, Israel and Palestine, and that one of these States, Israel, had not consented to the exercise of the Courts jurisdiction.<sup>92</sup> In addition the parties had agreed to settle the dispute by negotiation, with a possibility of settlement through arbitration. Furthermore, they argued, the Court should decline to render an advisory opinion on the basis *inter alia* of the precedent of the PCIJ decision on *Eastern Carelia*.<sup>93</sup>

The “reply” of the PCIJ in the *Eastern Carelia* case,<sup>94</sup> along with the opinion of the ICJ in the *Peace Treaty* case,<sup>95</sup> are the leading cases on the question of lack of consent, and these together with other relevant cases and material will be considered chronologically in the following paragraphs.

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<sup>91</sup> ICJ Reports 2004 p 136, paras. 46-50.

<sup>92</sup> See table 1 in chapter 8.2 for an overview of which participants raised this argument.

<sup>93</sup> ICJ Reports 2004 p 136, paras. 46-50.

<sup>94</sup> PCIJ, Ser. B., No. 5, 1923.

<sup>95</sup> ICJ Reports 1950 p 71.

#### 4.2.2 Status of Eastern Carelia Advisory Opinion

The consent of States as parties to a dispute is generally a condition of the Court's jurisdiction in contentious cases. The contention that consent is a requirement for the advisory jurisdiction of the Court assumes that the advisory procedure is a judicial procedure and this idea rests firmly on the reply of the *Eastern Carelia* case. This is the only case where the PCIJ refused to give an advisory opinion.

The *Eastern Carelia* opinion concerned the question of whether a certain declaration attached to the Treaty of Tartu concluded between Finland and Russia on October 14, 1920, had the same binding force as the treaty itself. The Court found that this question had a direct bearing on the dispute then pending between Finland and Russia which was not at that time a Member of the League of Nations and had not agreed either to the request for the opinion or to the Court giving it.<sup>96</sup>

This line of argument is based upon the general principle in international law according to which no state is obliged to submit any dispute with another State, or to give an account of itself to any international tribunal, and is an outcome of the concept of sovereignty.<sup>97</sup>

The Court declared in the *Eastern Carelia* case that its advisory function must be governed by the same fundamental considerations as those governing its function as a judicial tribunal in contested cases, which means that its jurisdiction in advisory cases must rest upon the consent of the States party to the dispute.<sup>98</sup>

The reasoning in this case amounted to the Court saying that it 'could not' give the opinion, for want of jurisdiction in the case, since a State which was vitally concerned, Russia, had not consented to this exercise by the Court.<sup>99</sup>

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<sup>96</sup> PCIJ, Ser. B., No. 5, 1923, p 28, and Pratap, supra note 21, p 154.

<sup>97</sup> Rosenne, supra note 15, p 1014, and PCIJ, Ser. B., No. 5, 1923, p 27.

<sup>98</sup> PCIJ, Ser. B., No. 5, 1923, p 27.

<sup>99</sup> Ibid, p 28.

The opinion of the Court was mainly based on the fact that non-participation by Russia in the proceedings before the Court would affect its ability to arrive at a judicial conclusion. What's more, the Court seems to have established that its competence to render an opinion depended upon its view of the competence of the Council of the League to consider the dispute.<sup>100</sup> This was because Russia was not a member of the League of Nations and had not given its consent to the solution of the dispute according to the methods provided for in the Covenant. The Court found that the submission of a dispute between a State not a member of the League and a member State for solution according to the methods provided for in the Covenant could take place only by virtue of the consent of both States.<sup>101</sup>

It can be concluded that the Court's refusal to reply to the request for an advisory opinion was based on the lack of competence on the part of the Council of the League of Nations to deal with the dispute. In other words, the reason for the Court declining to answer the request for an opinion was not the lack of consent by Russia, but because the Court had been asked for an opinion in the context of a dispute settlement procedure which had been improperly set in motion in the absence of the consent of Russia, which was not a member of the League. The Court was not discussing its own settlement procedure, but was concerned with the Council's settlement procedures laid down in the Covenant:

*"As concerns States not members of the League, the situation is quite different; they are not bound by the Covenant. The submission, therefore, of a dispute between them and a Member of the League for solution according to the methods provided for in the Covenant, could take place only by virtue of their consent. Such consent, however, has never been given by Russia."*<sup>102</sup>

In other words, the reasons behind the Court's refusal to give an advisory opinion were (i) Russia's refusal to give the Court the necessary documents, (ii) the lack of consent of one State, which rendered the Council incompetent and the request invalid and thus, indirectly

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<sup>100</sup> Lauterpacht, H., *The Development of International Law by the International Court of Justice* (Cambridge: Grotius Publications 1982) p 356, Keith, *supra* note 55, p 94, Amr, *supra* note 41, p 98.

<sup>101</sup> PCIJ, Ser. B., No. 5, 1923, pp 27-29.

<sup>102</sup> *Ibid*, pp 27-28.

affected the competence of the Court. Therefore, the Court found that if it acted and gave the opinion, it would be acting *ultra vires*.<sup>103</sup>

In the *Wall* opinion, the argument of lack of consent was based *inter alia* on the precedent of the decision of the PCIJ on the *Status of Eastern Carelia*. This was because Israel, like Russia in the *Eastern Carelia* case, had not consented to the settlement of the dispute by the Court or any other means of compulsory adjudication.<sup>104</sup>

Similarly, the Court referred to the *Peace Treaty* case which answered the question whether it should refuse to give an advisory opinion on the basis of the decision on the *Status of Eastern Carelia*.

#### 4.2.3 Peace Treaties Advisory Opinion

The views expounded in the *Peace Treaties* case,<sup>105</sup> by the present Court, today forms the guiding statement on the problem of the relevance and necessity of consent of States party to the dispute referred to the Court for an advisory opinion.<sup>106</sup>

In the *Peace Treaties* case the Court was asked to give an advisory opinion on certain questions relating to the disputes procedure established in the Peace Treaties concluded between Bulgaria, Hungary and Romania on the one hand, and the Allied and Associated Powers on the other, after the Second World War. There were objections to the competence of the Court on the ground that the three States had not consented to the judicial proceedings before the Court. In brief statements on this point, the objecting States referred to the *Eastern Carelia* case and to Articles 36 and 68 of the Statute of the Court.<sup>107</sup>

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<sup>103</sup> Pratap, supra note 26, p 155.

<sup>104</sup> ICJ Reports 2004 p 136, para. 46.

<sup>105</sup> ICJ Reports 1950, p 65.

<sup>106</sup> Rosenne, supra note 15, p 1014.

<sup>107</sup> ICJ Reports 1950, p 71.

In the *Peace Treaties* case the Court held that it was competent to give the opinion and that “it [was] under a duty to do so”.<sup>108</sup> It acknowledged that consent of States party to a dispute is the basis of the Court’s jurisdiction in contentious cases, but this was not so in advisory proceedings, even where the request relates to a legal question actually pending between States. The ICJ gave the following grounds for this point of view:

*“The Court’s reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take.”*<sup>109</sup>

The Court’s statements in this case apparently abandoned the principle laid down in the *Eastern Carelia* case when stating that consent of States, affected by a request or involved in a dispute to which that request relates, is not necessary for the Court to be able to give the opinion.<sup>110</sup> It said:

*“The objection [that is, the objection on the grounds of non-consent] reveals a confusion between the principles governing contentious jurisdiction and those which are applicable to Advisory Opinions. The consent, parties to a dispute, is the basis of the Court’s jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States.”*<sup>111</sup>

The Court indicated that its obligation to give an opinion was not absolute or unlimited, and in considering whether there was any reason why the Court should desist from giving the opinion, the Court distinguished the *Peace Treaties* case from the *Eastern Carelia* case by saying that:

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<sup>108</sup> ICJ Reports 1950 p71.

<sup>109</sup> Ibid.

<sup>110</sup> Pratap, supra note 26, p 157.

<sup>111</sup> ICJ Reports 1950 p 71.

*“There are certain limits, however, to the Court’s duty to reply to a Request for an Opinion. It is not merely an ‘organ of the United Nations’, it is essentially the ‘principal judicial organ’ of the Organization.”<sup>112</sup>*

Put simply, the challenge here was the limits to the Court’s duty to participate in the organisation of the UN as one of its principal organs. The Court then explained the purport of Article 65 of the Statute:

*“Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request. (...) the circumstances of the present case are profoundly different from those which were before the Permanent Court of International Justice in the Eastern Carelia case when that Court declined to give an Opinion because it found that the question would be substantially equivalent to deciding the dispute between the parties, and at the same time it raised a question of fact which could not be elucidated without hearing both parties. As has been observed, the present Request for an Opinion is solely concerned with the applicability to certain disputes of the procedure for settlement instituted by the Peace Treaties, and is justifiable to conclude that it in no way touches the merits of those disputes.”<sup>113</sup>*

The Court held that the reasons which lead the Permanent Court to refuse to reply were not relevant to the case before it. Having determined that it is competent to answer the request, the Court mentions *Eastern Carelia* in its consideration of how it would exercise its discretion. The Court is here solely concerned with the “*other reasons*” which make it “*very inexpedient*” for the Permanent Court to give an opinion in the *Eastern Carelia* case.<sup>114</sup> In other words the Court was then not concerned with the effect of non-consent on its competence, but with the effect giving an opinion would have on its ability to remain faithful to its judicial character and on the exercise of its discretion under Article 65 of its Statute.<sup>115</sup>

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<sup>112</sup> ICJ Reports 1950 p 72.

<sup>113</sup> Ibid.

<sup>114</sup> PCIJ, Ser. B., No. 5, 1923, p 28.

<sup>115</sup> Keith, *supra* note 55, p 115.

It has been stated that the *Peace Treaties* case confirms the argument put forward in relation to *Eastern Carelia* case: the consent or otherwise of States party to a dispute which has been referred to the Court for an advisory opinion has no direct effect on the Court's advisory competence.<sup>116</sup> Lack of consent may render the requesting organ incompetent and, if this is the case, then the Court will, according to the *Eastern Carelia* case, refuse to give an opinion. If, however, the request is made in the course of a valid consideration of the issue, as it was in the *Peace Treaties* case, then the Court is competent regardless of the non-consent of interested States to reply to any legal question.<sup>117</sup>

Additionally, the absence of a State's consent has no effect upon the Court's advisory jurisdiction even when the request relates to an inter-state dispute. As noted above, the Court based its view on the nature of the advisory opinion, which has no binding force upon the interested States. It also pointed out that these opinions are given directly to the requesting organ and not to the States concerned. Finally, it stated that:

*"...no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take."*<sup>118</sup>

In the *Wall* opinion the ICJ reiterated the principle laid down in the *Peace Treaties* opinion that lack of consent to the contentious jurisdiction of the Court has no bearing on the Court's jurisdiction to give advisory opinions.<sup>119</sup> However, in the *Peace Treaties* case the Court examined the opposition of certain interested states to the request by the General Assembly in the context of judicial propriety.<sup>120</sup> The Court points out that issues of judicial propriety are therefore relevant to consider also in the *Wall* opinion, even though lack of consent by interested States does not affect the jurisdiction of the Court.

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<sup>116</sup> See the arguments in Keith, *supra* note 55, pp 115-117.

<sup>117</sup> Ibid.

<sup>118</sup> ICJ Reports 1950 p 71.

<sup>119</sup> ICJ Reports 2004 p 136, para. 47.

<sup>120</sup> Ibid.



#### 4.2.4 Reservations Advisory Opinion

In the *Reservations to the Convention on Genocide* advisory opinion,<sup>121</sup> it was argued that since the request related to a dispute between States, the Court should decline to give an opinion. Furthermore, the lodging of an objection or a reservation made by a State to the Convention constituted a dispute. In order to avoid adjudicating on that dispute the Court should refrain from replying to the first two questions.<sup>122</sup> The Court did not, however, accede to the view that the mere existence of a dispute between individual States on the matter ought to lead it to refuse to give an opinion, and referred to its views on the *Peace Treaty* case in the following words:

*“In this connection, the Court can confine itself to recalling the principles which it laid down in its Opinion of March 30<sup>th</sup> 1950 (ICJ Reports 1950 p. 71). A reply to a request for an Opinion should not, in principle, be refused. The permissive provision of Article 65 of the Statute recognises that the Court has power to decide whether the circumstances of a particular case are such as to lead the Court to decline to reply to the request for an Opinion. At the same time, Article 68 of the Statute recognises that the Court has the power to decide to what extent the circumstances of each case must lead it to apply to advisory proceedings the provisions of the Statute which apply in contentious cases.”*<sup>123</sup>

The Court went on to note that the object of the request was to guide the United Nations in respect of its own actions. The General Assembly which drafted and adopted the Genocide Convention, and the Secretary-General, who was the depository of the instrument of ratification and accession, had an interest in knowing the legal effects of reservations to that Convention and more particularly the legal effects of objections to such reservations.<sup>124</sup> The legal opinion of the *Peace Treaties* case was consequently reiterated in the *Reservations* case. The Court concluded that the principle of consent of the disputant

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<sup>121</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion 28 May 1951 (ICJ Reports 1951 p 15).

<sup>122</sup> ICJ Reports 1951 p 19.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid and Pratap, supra note 26, p 163.

parties is not relevant to its advisory jurisdiction. Thus it was confirmed that a reply to a request for an advisory opinion should not be refused according to this challenge.<sup>125</sup>

Compared to the *Reservations* case, the argument of lack of consent in the *Wall opinion* involves the fact that the question concerns a “*contentious matter*” between Israel and Palestine.<sup>126</sup> As in the *Reservations* case, the Court refers to the *Peace Treaties* case when giving its reasons why it chooses not to use its discretionary power in the *Wall* opinion. In addition, the Court notes that Israel and Palestine do have radically divergent views on the question concerned, but, referring to another previous case, states that:

“*Differences of views...on legal issues have existed in practically every advisory proceeding.*”<sup>127</sup>

In other words, a dispute between States does not limit the Court’s jurisdiction, even when there is lack of consent from one of these States to the advisory jurisdiction of the Court.

#### 4.2.5 Western Sahara Advisory Opinion

The ICJ extensively examined the issue of lack of consent in the *Western Sahara* case.<sup>128</sup>

This case concerned the question of whether the territory of Western Sahara was *terra nullius* at the time of its colonization by Spain. It was also asked what the legal ties were between Western Sahara and the Kingdom of Morocco and the Mauritanian entity.

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<sup>125</sup> ICJ Reports 1951, p 19.

<sup>126</sup> ICJ Reports 2004 p 136, para. 46.

<sup>127</sup> *Legal Consequence for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion 21 June 1971 (ICJ Reports 1971 p 24) cited in ICJ Reports 2004 p 136, para. 48.

<sup>128</sup> *Western Sahara*, Advisory Opinion (ICJ Reports 1975, p 12).

In the *Western Sahara* case Spain argued that the ICJ was incompetent to deal with the matter because it did not give its consent to the Court, and because both Morocco and Mauritania were using the advisory jurisdiction of the Court to circumvent the principle of consent to adjudication.<sup>129</sup>

The ICJ pointed out that in contrast to the *Eastern Carelia* case, where Russia was neither a member of the League nor party to the PCIJ's statute Spain, as a member of the UN, had accepted the Charter and the Statute, whereby it had in general given prior consent to the exercise of the Court's advisory jurisdiction.<sup>130</sup> Moreover, the Court noted that the question was related mainly to the possibility of the application of the General Assembly's resolutions. Therefore, the Court stated that the aim of this question was to assist the Assembly in fulfilling its functions, namely the decolonisation of the territories.<sup>131</sup> Furthermore, the Court found that Spain, unlike Russia in the *Eastern Carelia* case, had actively participated in the advisory opinion proceedings before the Court and "*furnished very extensive documentary evidence of the facts*".<sup>132</sup> Consequently, there was no issue of "*inadequacy of the evidence*", as in *Eastern Carelia*, operating "*for reasons of judicial propriety*", to prevent the Court from giving an opinion.<sup>133</sup>

The Court refers directly to the *Western Sahara* case in the *Wall* opinion, repeating a statement saying that lack of consent might constitute a reason for declining to give the requested opinion, if considerations of judicial propriety are present.<sup>134</sup> Lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character, if it would have the effect of circumventing the principle of consent from States before referring the dispute to judicial settlement. The Court does not

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<sup>129</sup> ICJ Reports 1975, p 20.

<sup>130</sup> Ibid, p 24.

<sup>131</sup> Ibid.

<sup>132</sup> ICJ Reports 1975 pp 24-25.

<sup>133</sup> Ibid.

<sup>134</sup> ICJ Reports 2004 p 136, para. 47.

regard this fact to be present in the *Wall* case, and therefore does not see it as a “compelling reason” to refuse to answer the request.<sup>135</sup>

Moreover, the Court compares the *Western Sahara* case to the *Wall* opinion, saying that the Court found a legal controversy to exist in the former case, but that this “dispute” had not arisen independently in bilateral relations. The legal controversy had arisen during the proceedings of the General Assembly and in relation to matters with which the Assembly was dealing. In the *Wall* opinion, the Court acknowledges that there are divergent views between the parties, but this is common for all advisory proceedings before the Court. In addition, the Court points out that the Israel - Palestine conflict cannot be regarded as only a bilateral dispute, but is of direct concern to the whole of the UN. In other words, the Court is saying that answering a request for an advisory opinion in the case concerning the wall will not be equivalent to circumventing the principle of consent when submitting a dispute to judicial settlement. This is because the dispute in question is located in a much broader frame of reference than a bilateral dispute.<sup>136</sup>

#### 4.2.6 Discretion based on the Court's Character as a Principal Organ of the UN

The Court has made clear that as a principal organ of the UN, it should normally give opinions on a legal question when asked to do so by a competent organ or specialized agency of the UN. Thus, in the *Peace Treaties* case the Court said that the permissive wording of Article 65 gives the Court a large amount of discretion when examining whether a request for an advisory opinion should be declined.<sup>137</sup>

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<sup>135</sup> ICJ Reports 2004 p 136, para 50.

<sup>136</sup> Ibid, paras.49-50.

<sup>137</sup> ICJ Reports 1950 p 72, see also ICJ Reports 1951 p 19 and ICJ Reports 1962 p 155.

More recently, in the *Legality of the Threat or Use of Nuclear Weapons* opinion,<sup>138</sup> the Court, citing statements in several previous cases, stated that only ‘compelling reasons’ should lead it to refuse to give an opinion when requested to do so by a competent organ. Such ‘compelling reasons’ have not been found to exist in the previous cases before the Court, although the PCIJ declined to render an opinion in the *Eastern Carelia* case.<sup>139</sup>

There is no doubt that the wording of Article 65 of the Statute gives the Court a discretionary power to reply to requests for advisory opinions. However, the discretion of the Court seems inconsistent with the position of the ICJ within the framework of the UN, where its special position imposes upon it an obligation to co-operate with the UN organs and its specialized agencies.

This obligation can be justified on the basis of the organisational relationship between the Court and the UN, whereby the Court is considered to be the judicial arm of the UN, and its opinions of great importance to UN organs in clarifying the legal norms in issues before them.

As noted by Amr, a senior lecturer of Public International Law at Cairo University, and currently Deputy Permanent Delegate of Egypt to UNESCO in Paris, writes in his book “*The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations*”, that several advocates have suggested that the above arguments should lead to the conclusion that the Court has no discretionary power with regard to its advisory jurisdiction.<sup>140</sup> Because the refusal of the ICJ to give a judgement in contentious cases is considered a ‘denial of justice’, this attribute, extended and applied here, is analogous to

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<sup>138</sup> ICJ Reports 1996 p 235.

<sup>139</sup> PCIJ, Ser. B., No. 5, 1923.

<sup>140</sup> Amr, *supra* note 41, pp 106-107, Greig, D., *The Advisory Opinions of the ICJ and the Settlement of Disputes between States*, ICLQ, 15, 1966, pp 337-338, Conforti, B., *The Law and Practice of the United Nations* (Leiden: Martinus Nijhoff 2005) p 217.

the Court refusing to give an advisory opinion to the requesting organ, since there is no difference in jurisdiction.<sup>141</sup>

Additionally, it has been observed that this point of view cannot rely on the legal opinion in the *Eastern Carelia* case, as there are significant differences between the position of the PCIJ as a non-organ of the League of Nations and the position of the ICJ as the principal judicial organ of the UN.<sup>142</sup> This is also based on the Court's dictum in the *Peace Treaty* case when the Court remarked that:

*“there are certain limits to the Court's duty to reply to advisory opinions. It is not merely an organ of the United Nations, it is essentially the ‘principal judicial organ’ of the organisations”.*<sup>143</sup>

Accordingly, the discretion of the ICJ is not absolute, but is restricted by the overriding principle of the Court's duty as a principal organ of the United Nations.<sup>144</sup>

On several occasions the Court has commented that it considers itself to be under an obligation to participate in the activities of the UN. The giving of an advisory opinion is regarded as such participation, and should in principle, not be refused by the Court unless there are “compelling reasons” for such a refusal.<sup>145</sup>

In the *Wall* advisory opinion, the Court regards the subject of the request not only as a bilateral matter between Israel and Palestine. It says that:

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<sup>141</sup> Amr, supra note 41, p 106.

<sup>142</sup> Ibid, p 107. See also Pomerance, M., *The Advisory Function of the International Court in the League and the U.N. Eras* (Baltimore: The John Hopkins University Press 1973).

<sup>143</sup> ICJ Reports 1950, p 71.

<sup>144</sup> Amr, supra note 41, p 106.

<sup>145</sup> Ibid, p 108, and ICJ Reports 1950 p 71.

*“Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it is the Court’s view that the construction of the wall must be deemed to be directly of concern to the United Nations.”<sup>146</sup>*

As the request is regarded to be within the responsibilities of the United Nations, the Court argues that the object of the request is for the Court to give assistance to the General Assembly in the proper exercise of its functions.<sup>147</sup>

Such assistance is one of the main functions of the ICJ as the principal judicial organ within the UN, and as noted above, should in principle not be refused, unless “compelling reasons” say otherwise.

#### 4.2.7 Conclusion

A distinguished professor of law and a former judge at the ICJ, Sir Hersch Lauterpacht, points out that if the consent of litigant States is a required condition for the ICJ to give an advisory opinion, it means that these states can hinder the interested organ from requesting an opinion from the ICJ.<sup>148</sup> Consequently, the work of UN bodies would be impeded, and the advisory function of the ICJ, which is one of its main functions, could be diminished. It has also been stated by Lauterpacht, that, by giving the Court the general power to render advisory opinions, the members of the UN agree to its advisory jurisdiction on any legal question whether it involves their interests or not. The Statute of the Court being an integral part of the UN Charter also undermines this argument.

Furthermore, Lauterpacht notes that there should be no decisive reason why the sovereignty of States should be protected from the procedure, to which they have consented in advance

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<sup>146</sup> ICJ Reports 2004 p 136, para. 49.

<sup>147</sup> Ibid, paras. 49-50.

<sup>148</sup> Lauterpacht, supra note 100, p 358. See also comments to statements made by Lauterpacht in: Pratap, supra note 26, p 165 and Amr, supra note 41, p 95.

as members of the UN, of ascertaining the law through a pronouncement that is non binding.<sup>149</sup>

In conclusion, the consent of litigant States today is not considered by the Court to be an appropriate condition for requesting an advisory opinion from the ICJ with regard to inter-state disputes. The Court is quite clearly not prevented from acting judicially by the mere fact that an interested State has not consented to the proceedings. Accordingly, UN organs may bring any matter relating to an existing dispute between States before the ICJ for an advisory opinion.<sup>150</sup>

However, even though the Court has set aside the principle of consent of States as the basis of its jurisdiction in advisory cases relating to disputes, the issue of consent as a question of propriety seems to have been left unaffected.<sup>151</sup> The Court has recognized that in:

*“certain circumstances . . . the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court’s judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent”.*<sup>152</sup>

There are several situations which might give rise to issues of propriety. However, it will depend on the circumstances of the case involved whether the Court should decline to answer the question on which the opinion is requested. It is entirely up to the powers of the Court to decide whether such circumstances exist.

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<sup>149</sup> Lauterpacht, supra note 100, p 358.

<sup>150</sup> Amr, supra note 41, p 97, Keith, supra note 55, p 116.

<sup>151</sup> Pratap, supra note 26, p 162.

<sup>152</sup> ICJ Reports 1975 p 25.



Consequently, the Court can still find lack of consent as a compelling reason to refuse to give an advisory opinion. This can be the case where absence of consent affects the availability of relevant material.<sup>153</sup>

Finally, it should be noted that the Court today makes a distinction between issues of general principle and the decision of specific disputes, and the need to advise UN organs on legal issues and the binding of disputing States. The Court's advisory jurisdiction does not settle disputes, but its purpose is to assist the requesting organ to reach a solution or adopt a resolution. During the formulation of the Charter, there was never the intention of restricting the Court's advisory jurisdiction to purely non-contentious situations.<sup>154</sup>

As mentioned in chapter 4.2.6, there have been some objections to the PCIJ *dictum* in the *Eastern Carelia* case as an irrelevant precedent because the organisation of the international community has advanced since the time of this case, so that a non-member of the UN cannot argue its non-membership as a challenge to the advisory jurisdiction of the Court. The Court's legal opinion seems to support this view in several cases.<sup>155</sup>

### 4.3 Lack of Facts

A further argument in the *Wall* opinion contending that the Court should exercise its discretion and refuse to render the advisory opinion, was that the Court did not have the requisite facts and evidence to enable it to reach a judicial conclusion. This argument was in particular raised by Israel, stating that:

*“(...) the Court could not give an opinion on issues which raise questions of fact that cannot be elucidated without hearing all parties to the conflict”.*<sup>156</sup>

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<sup>153</sup> Keith, *supra* note 55, p 230.

<sup>154</sup> Amr, *supra* note 41, pp 94-95.

<sup>155</sup> As example see ICJ Reports 1950 p 65.

<sup>156</sup> ICJ Reports 2004 p 136, para. 55.

A Court should, generally speaking be in possession of all material which is relevant to its proper consideration of the case and to its decision according to law. In its advisory proceedings the ICJ has always been concerned to see that it had such access. The question is whether the Court has sufficient information to enable it, as a judicial body, to give an answer to the request. Where the question posed cannot be answered without certain factual determinations and the material before the Court does not permit a properly judicial conclusion regarding those facts, this can be one factor which the Court can conclude to be such a ‘compelling reason’ as to lead it to refuse to give the requested opinion.<sup>157</sup>

The question in the *Eastern Carelia* case, was in the opinion of the Court, a ‘question of fact’.<sup>158</sup> After deciding that it was impossible for the Court to reply, the Court gave reasons which rendered it “*very inexpedient*” for it to reply:

*“The question whether Finland and Russia contracted on the terms of the Declaration as to the nature of the autonomy of Eastern Carelia is really one of fact. To answer it would involve the duty of ascertaining what evidence might throw light upon the contentions which have been put forward on this subject by Finland and Russia respectively, and of securing the attendance of such witnesses as might be necessary. The Court would of course, be at a very great disadvantage in such an enquiry, owing to the fact that Russia refuses to take part in it. It appears to be very doubtful whether there would be available to the Court materials sufficient to enable it to arrive at any judicial conclusion upon the question of fact.”*<sup>159</sup>

The Court thus makes it very clear that as a judicial body it must be in possession of all relevant material, including, at least in some cases, material from both parties. If the Court is unable, because of lack of material, to give full and proper consideration to the request it will, as a judicial body, feel obliged to decline to reply.<sup>160</sup>

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<sup>157</sup> Pratap, supra note 26, p 149.

<sup>158</sup> PCIJ, Ser. B., No. 5, 1923 p 28.

<sup>159</sup> Ibid.

<sup>160</sup> Keith, supra note 55, p 186.

The ILOAT advisory opinion dealt with the matter of the judgments of the Administrative Tribunal of the International Labour Organisation (ILO) upon complaints made against the United Nations Educational, Scientific and Cultural Organization (UNESCO).<sup>161</sup> In this case the Court acknowledged that:

*“The judicial character of the Court requires that both sides directly affected by these proceedings should be in a position to submit their views and their arguments to the Court. The principle of the equality of the parties follows from the requirements of the good administration of justice”.*<sup>162</sup>

After deciding that the parties were in a position of equality, even though no oral proceedings were held, the Court came to the conclusion that it was satisfied that adequate information had been made available to it. There was, therefore, no compelling reason why the Court should refuse to reply.<sup>163</sup>

The Court reiterated this statement in the *Western Sahara* case, when it observed that extensive documentary evidence of the relevant facts had been provided, and considered this to be sufficient information for the Court to deliver its opinion.<sup>164</sup> Even so, it was stated by the Court in this case that what is decisive in these circumstances is:

*“whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed question of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character.”*<sup>165</sup>

The Rules of Court requires requests to be accompanied by all documents likely to throw light on the question. The Court has also had the practice of inviting States and

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<sup>161</sup> *Judgements of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion 23 October 1956 (ICJ Reports 1956 pp 77).

<sup>162</sup> *Ibid*, p 86.

<sup>163</sup> *Ibid*.

<sup>164</sup> ICJ Reports 1975 p 37.

<sup>165</sup> *Ibid* pp 28-29, also referred to in ICJ Reports 2004 p 136, para. 56.

international organisations to present both written and oral arguments prior to looking at the case in question. In giving interested States and organisations this opportunity the Court ensures that it has sufficient information on which to base its opinion. Thus, a State contending that the Court does not have the requisite information to render the advisory opinion may have difficulty being heard by the Court as all States have the opportunity to supply the Court with the relevant facts they find to be necessary.

The obligation of the requesting organs to forward all relevant documents and the opportunity of interested States and organisations to present arguments and information ensures in most cases that the Court has all necessary information.<sup>166</sup>

In the *Wall* opinion, the Court regards itself to have sufficient information and evidence to enable it to give the requested opinion. The Court refers to the report of the Secretary-General and a voluminous dossier submitted by him to the Court. There are also written statements updating the Secretary-General's report, and written statements from other participants, including Israel's statement and documents issued by the Israeli Government which are in the public domain.<sup>167</sup>

In addition, the court notes that even though others may evaluate and interpret the information submitted to Court in a subjective or political manner, this cannot be an argument or be regarded as a compelling reason for the Court to decline to give the requested opinion.<sup>168</sup>

#### 4.4 Lack of Useful Purpose

Furthermore, it was argued in the *Wall* opinion that the Court should decline the request for an advisory opinion because such an opinion would lack any useful purpose.<sup>169</sup>

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<sup>166</sup> Keith, *supra* note 55, p 188-190.

<sup>167</sup> See table 1 in chapter 8.2 for an overview of the written statements given by States and organisations.

<sup>168</sup> ICJ Reports 2004 p 136, para. 58.

<sup>169</sup> *Ibid*, para. 59.

It has been suggested that the Court should use its discretion if it is of the view that rendering an opinion will not help solve the problem which gave rise to the request. This argument can be accepted only in one very limited case: where the Court held that a particular request could lead to an opinion which had no useful purpose. This can be where the Court is asked a question which it holds as irrelevant to the disposition of the problem facing the requesting body.<sup>170</sup> Thus, if the Court finds that its opinion would be ineffective or without purpose, this could be regarded as a ‘compelling reason’ to refuse to answer the request.<sup>171</sup>

This was implicitly stated in the *Northern Cameroons* case,<sup>172</sup> and in the *Nuclear Tests* cases.<sup>173</sup> In the former case, the Court stated that:

*“the function of the Court is to state the law, but it may pronounce judgement only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court’s judgement must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgement on the merits in this case could satisfy these essentials of the judicial function.”*<sup>174</sup>

In the *Wall* opinion it was argued by several States that the General Assembly would not need an opinion from the Court because it had already declared the construction of the wall to be illegal and determined the legal consequences by demanding that Israel stop and reverse its construction. More specifically, it is here argued that the opinion sought would not be of clarification of the law which could be expected to assist the requesting organ, the General Assembly.<sup>175</sup> Accordingly, the opinion would be ineffective and without purpose.

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<sup>170</sup> Keith, *supra* note 55, p 232.

<sup>171</sup> Amr, *supra* note 41, p 109.

<sup>172</sup> *Northern Cameroons*, Judgement 2 Decemer 1963 (ICJ Reports 1963 p 15).

<sup>173</sup> *Nuclear Tests* (New Zealand v. France), Judgement 20 December 1974 (ICJ Reports 1974 p 457), *Nuclear Tests* (Australia v. France), Judgement 20 December 1974 (ICJ Reports p 253).

<sup>174</sup> ICJ Reports 1963, pp 33-34.

<sup>175</sup> See table 1 in chapter 8.2 for an overview of which participants that gave this argument.

This argument has also been raised in previous cases before the ICJ.

It is highly unlikely that the Court, which considers itself to be under obligation to cooperate with other organs of the UN, would hold the request to be without purpose.

However, except for in very limited circumstances, as mentioned above, the proposition that the Court should determine the likely value of the opinion cannot be accepted without argument.

First, the relevant political organ, after considering the matter which gave rise to the request, presumably has judged by the appropriate majority and following its own procedures, that it would be valuable to have the opinion of the principal judicial organ of the UN system on some legal issue.

Determining the possible value of an advisory opinion before it is given, is difficult and would involve an assessment of how the requesting organ and interested States are going to act in the future.

Sir Kenneth James Keith, a New Zealand judge appointed to the ICJ in November 2005, mentioned this procedure for his Masters of Laws, published in 1971. Keith calls determining the value of advisory opinions for “guesswork”, and notes that the body which made the request, and will later act upon it, is the body best qualified to make such a guess.<sup>176</sup> The requesting body can always withdraw the request, if second thoughts occur.

Second, such an assessment would put the Court in an awkward position, as it would have to judge and predict the likely action of political organs and States.

These arguments suggest a third major objection: whether an opinion is likely to be acceptable depends on the content of the opinion. In other words, the Court would not

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<sup>176</sup> Keith, *supra* note 55, p 232.

generally be able to enter into speculation until it has reached its substantive conclusion, and speculation at that point would be highly discriminatory: if the Court's substantive conclusions impose a minimum of obligations on States or it recognises minimal powers in the organisation they are much more likely to be accepted than an opinion to the opposite effect. It would presumably follow that the Court should have given the second opinion. Such inequality conflicts with a basic concept of the judicial process.<sup>177</sup>

Fourth, the argument would generally be difficult to reconcile with the obligation of the Court as an organ of the UN to cooperate with other organs.

Finally, the Court should generally not be concerned with the possible effects of its decisions.<sup>178</sup>

The arguments mentioned above seem to be the basis for the Court's conclusion in the *Legality of the Threat or Use of Nuclear Weapons* case, where the Court declined to inquire into the purpose for which an opinion was requested:

*"(...) it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs."*<sup>179</sup>

The Court reiterated this statement in the *Wall* opinion and concluded that it cannot decline to answer the question posed based on the grounds that the opinion would not have any useful purpose.<sup>180</sup>

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<sup>177</sup> Keith, *supra* note 55, p 233.

<sup>178</sup> Ibid.

<sup>179</sup> ICJ Reports 1996 p 237.

<sup>180</sup> ICJ Reports 2004 p 136, para. 62. See table 1 in chapter 8.2 for an overview of which States and organisations that gave this argument.

However, one could imagine a situation where there are good reasons for the Court to consider that its opinion would not be of positive assistance and that it might even be detrimental to the work of the UN if it were to render the opinion. Even so, it is submitted that the Court would only in very exceptional circumstances use its discretion to refuse to comply with its duty to reply to a request for an opinion if it can do so while remaining faithful to its judicial character and its obligation to act judicially.

#### 4.5 Complicated Negotiations or Political Implications

A further argument in the *Wall* opinion presented as to the propriety of the exercise of the Court's judicial function was that an advisory opinion on this matter could impede and complicate a political, negotiated solution to the Israeli-Palestinian conflict.<sup>181</sup>

If the Court considers that an opinion would be unlikely to assist the requesting organ and, if it considers that rendering an opinion would have an adverse effect of the work of the UN as a whole, this might constitute a compelling reason for the Court to decline to give the requested opinion. The Court might find that giving an opinion could complicate the matter or create difficulties for another part of the UN in carrying out its responsibilities.<sup>182</sup>

The purpose of the UN is to maintain international peace and security, and to take such collective measures to prevent and remove threats to peace. It also plays a key role in trying to achieve international co-operation in resolving international problems.<sup>183</sup>

The contention that an advisory opinion on the legality of the wall and the legal consequences of its construction could complicate a negotiated solution is based on the view that this would be contrary to the work of the UN, as its main function is to promote such negotiated solutions and settlement.

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<sup>181</sup> ICJ Reports 2004 p 136, para. 51.

<sup>182</sup> Amr, *supra* note 41, p 108.

<sup>183</sup> UN Charter Article 1.



However, the Court has stated that it is difficult to predict the possible effects of an advisory opinion and to make clear what influence an opinion might have on the specific negotiations in a conflict.<sup>184</sup>

It seems as though the Court does not consider an advisory opinion to have a negative effect in such a matter. On the contrary, as the Court pointed out in the *Legality of the Threat or Use of Nuclear Weapons* case, it can be an additional element in the negotiations:

*“Beyond that, the effect of the opinion is a matter of appreciation.”*<sup>185</sup>

The Court concludes in the *Wall* opinion, that it does not regard this factor as a compelling reason to decline to exercise its jurisdiction.<sup>186</sup>

#### 4.6 Propriety of Giving Advisory Opinions

Finally, it is argued that good faith and the principle of “clean hands” provide a compelling reason that should lead the Court to refuse the General Assembly’s request.<sup>187</sup> The argument contains an assertion that Palestine is responsible for acts of violence, and that the wall is built as protection for the Israeli population. Because of this, Palestine cannot seek a remedy for a situation resulting from its own wrongdoing.<sup>188</sup>

This argument has not been put forward in previous cases before the ICJ, and the Court did not find it to be relevant in the *Wall* case, as the advisory opinion is not given to Palestine or Israel, but to the requesting organ, which in this case is the General Assembly. The prior

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<sup>184</sup> ICJ Reports 2004 p 136, para. 53.

<sup>185</sup> ICJ Reports 1996, p 237.

<sup>186</sup> ICJ Reports 2004 p 136, para. 53.

<sup>187</sup> See table 1 in chapter 8.2 for an overview of which States and organisations that gave this argument.

<sup>188</sup> ICJ Reports 2004 p 136, para. 63.

actions of the parties involved can therefore not be regarded as compelling reasons for the Court to exercise its discretion.

## 5 The Legal Effect of Advisory Opinions

### 5.1 The Non-Binding Effect of Advisory Opinions

It is an established view that the advisory opinions of the ICJ are not binding upon the requested organs and consequently there is no obligation upon them to follow the Court's advice.<sup>189</sup> This view is founded in the different function of advisory opinions and judgements, whereas advisory opinions are regarded as "advisory". Thus, the binding effect of the Court is limited to the Court's judgements.

However, the advisory opinions of the ICJ may be prescribed with a binding effect in advance by the international instrument concerned, other than the Charter and the Statute. Such provisions are known as "*advisory arbitration*", or "*advisory opinion with binding force*", or "*compulsive effect*" opinions.<sup>190</sup> The common feature of these provisions is that they characterise the opinion requested of the Court as a "decision" in relation to the dispute at issue.<sup>191</sup> In practice, numerous institutions within the UN system have adopted this provision in their instruments. For instance, article 8, section 21(b) of the Headquarters Agreement between the UN and USA indicates that the Court's opinion has a binding effect upon the requesting organ.<sup>192</sup>

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<sup>189</sup> Rosenne, S., *The International Court of Justice: An Essay in Political and Legal Theory*, (Leiden: Sijhoff 1957) p 441 cited in Amr, supra note 41, p 110.

<sup>190</sup> Amr, supra note 41, p 112.

<sup>191</sup> Pratap, supra note 26, p 47, Keith, supra note 55, p 196, Amr, supra note 41, p 112, Rosenne, supra note 15, p 682.

<sup>192</sup> Ibid, and United States Headquarters Agreement 4 August 1947 (*Agreement between the United Nations and the United States of America Regarding the Headquarters of the United Nations*).

In addition, States may agree in advance that the Court's advisory opinion with regard to a special matter will be binding upon them. So far, there has been no instance of such agreement in the UN era.<sup>193</sup>

In the above two cases, the Court's opinions are binding upon the organisations and concerned States. This effect is based on the prior consent of the organisation or concerned States.<sup>194</sup>

Even so, unless there is a specific provision giving these opinions binding effect, the established view, as mentioned above, is that the Court's opinions are not binding.

Despite the fact that practice has shown that the organs and agencies concerned have faithfully followed the Court's opinions, it should be stressed that the refusal to respect an advisory opinion might impair and diminish the authority of the Court as a legal adviser in public opinion.<sup>195</sup> In addition to this view, it has also been noted that although advisory opinions are not thought to be binding in a technical and formal sense, their persuasive character and substantive authority are considerable.<sup>196</sup> This is because they are judicial 'pronouncements' of the highest international tribunal and statements of law contained in them are of the same high quality as those contained in judgements.<sup>197</sup> Accordingly, advocates making this argument conclude that the requesting organ would not be in a very good position before the world if it paid no attention to the Court's opinion.

So far, no organ has taken action directly contrary to any advisory opinion given by the ICJ. On the contrary, the Court's opinions have been received and respected by the

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<sup>193</sup> Amr, *supra* note 41, p 113.

<sup>194</sup> *Ibid*, p 113.

<sup>195</sup> *Ibid*, p 120.

<sup>196</sup> Pratap, *supra* note 26, p 231.

<sup>197</sup> *Ibid*, Amr, *supra* note 41, p 111, Hudson, M., *The Effect of Advisory Opinions of the World Court*, AJIL, 42, 1948, p 630.

organs.<sup>198</sup> This attitude shows to what extent the Court's opinions have an effect upon these organs.

## 5.2 The Effect of the *Wall* opinion

In the *Wall* opinion the ICJ answered the call to unravel a part of the enormous legal tangle of the situation in the Middle East by rendering its advisory opinion on the construction of a security barrier. The Court was united in most of its findings, though one judge maintained that the Court should have declined to exercise its jurisdiction in this case for lack of sufficient information and evidence.<sup>199</sup> However, by his own admission, he agreed with what the Court actually said on many points of law.<sup>200</sup>

Andrea Bianchi, a professor of International Law at the Graduate Institute of International Studies in Geneva, noted in one article regarding the *Wall* opinion, that the ICJ in this case unequivocally manifested its intention to be an actor in the process of providing guidance and directing change during an uncertain period for the international community.<sup>201</sup>

Bianchi regards the relevance of this advisory opinion not to lie within the political significance for the situation in the Middle East, but rather in the stances taken by the Court on the many topical issues of general international law, which may also have an impact in other contexts.<sup>202</sup> The Court has in numerous cases dealt with highly sensitive political issues, both in its contentious and advisory jurisdiction. Its findings have often had a more general impact for international law and its development, going beyond the contingencies

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<sup>198</sup> Amr, *supra* note 41, p 119.

<sup>199</sup> ICJ Reports 2004 p 136, Declaration of Judge Burgenthal, para. 10.

<sup>200</sup> *Ibid*, paras. 1-2.

<sup>201</sup> Bianchi, A., *Dismantling the Wall*, In: German Yearbook of International Law (2004) p 343.

<sup>202</sup> *Ibid*, p 345.

of the particular case in question.<sup>203</sup> It suffices here to mention the intervention in *Nicaragua*,<sup>204</sup> or the issue of the *Legality of the Use or Threat of Nuclear Weapons* case.<sup>205</sup>

The fact that the Court has never declined to exercise its jurisdiction on the ground of the political character of the legal questions submitted to it, in both contentious cases and advisory opinions, shows the determination by the Court not to avoid taking a stance on heavily-charged issues of international politics. The Court has adopted a broad concept of the term “*legal questions*” and has not found that political motives or even the drafting of the question in abstract terms to limit its responsibility in this regard.<sup>206</sup> As long as a certain issue can be characterized as *legal*, the underlying policy issues have never prevented the Court from discharging its judicial function. As Professor Brownlie put it; “*political issues do not cease to be such because they are also legal issues*”.<sup>207</sup>

The *Wall* opinion rendered by the ICJ can be seen as yet another example of how, at times, the law can be inextricably linked to politics.<sup>208</sup>

The nearly unanimous stance taken by the judges in the *Wall* opinion should not be underestimated. It attests to their perception of both the importance of the underlying legal issues and, most of all, the need to speak with one voice, thus providing guidance not just to the requesting body but also to the international community as a whole.<sup>209</sup> However, whether or not the Court succeeded in conveying to the outside world such an impression is open to question.

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<sup>203</sup> Bianchi, *supra* note 201, p 345.

<sup>204</sup> *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America) Judgement 27 June 1986 (ICJ Reports 1986 p 14).

<sup>205</sup> ICJ Reports 1996, p 226.

<sup>206</sup> Amr, *supra* note 41, p 120.

<sup>207</sup> Brownlie, *supra* note 27, p 694.

<sup>208</sup> Bianchi, *supra* note 201, p 345.

<sup>209</sup> *Ibid.*

In addition, all the other organs of the UN had already expressed their views within their respective fields of competence.<sup>210</sup> This adds further emphasis to the symbolic and practical value of the Court's opinion.

## 6 Extension of the Jurisdiction of the ICJ

Various possibilities for expansion of the Court's role have been suggested, and several of these directly concern the Court's role in relation to international organisations.

There is an obvious need for international dispute settlement procedures, and the possibilities of using the ICJ to meet this need have been considered, either by extending the use of the advisory opinion, or, in an even more radical proposal, by giving to the UN, and perhaps other specialized agencies, direct standing to sue, or be sued, as a party.<sup>211</sup>

### Extending the Right to Request an Advisory Opinion

#### 6.1 Secretary General

The Secretary General is the only principal organ of the UN that has not been authorised by the General Assembly to request an advisory opinion of the ICJ.

The Court's opinion may be of direct relevance to the work of the Secretary General. However, the argument of giving the power of request to the Secretary General presupposes that neither the Security Council nor the General Assembly is prepared to

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<sup>210</sup> See the Dossier prepared by the Secretariat of the UN on the occasion of the advisory proceedings, available at: [http://www.icj.cij.org/icjwww/idocket/imwp/imwppleadings/imwp\\_iFullDossier\\_20040119.pdf](http://www.icj.cij.org/icjwww/idocket/imwp/imwppleadings/imwp_iFullDossier_20040119.pdf) cited in Bianchi, *supra* note 201, p 347.

<sup>211</sup> Bowett, D.W., *The Court's role in relation to international organizations* In: *Fifty years of the International Court of Justice, Essays in honour of Sir Robert Jennings*. Edited by Lowe and Fitzmaurice (Cambridge: Grotius Publications Cambridge University Press 1996), p 187.

make the request. In such circumstances it would seem likely that the Secretary General lacks the political support of one or both main political organs. The granting of the power could therefore seem to increase the risk of conflict between the Secretary General and the other main organs of the UN, the Security Council and the General Assembly. This may be too high a price to pay for the advantage gained.<sup>212</sup>

## 6.2 States

The practise of giving States the right to request an opinion is already accepted in the European Communities.<sup>213</sup>

This suggestion has its attractions as States frequently face questions where they are unsure of their position under international law. Newer, smaller States may not have experienced legal advisors in their Foreign Offices who can give the necessary advice with confidence. However, there could be drawbacks. Such a ‘free legal advice’ service might prove to be so attractive that it would greatly increase the Court’s workload.

Furthermore, the *Eastern Carelia* principle would have to apply: if the question raised with the Court involved an actual pending dispute with another State, it would be quite wrong for the Court to advise one party without hearing the other party, and receiving its consent.<sup>214</sup>

## 6.3 Greater Use of the ‘Compulsive’ or ‘Binding’ Advisory Opinion

This technique of giving what is *prima facie* a purely advisory opinion, a binding character, is well established. It has been used in several treaties on privileges and immunities,

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<sup>212</sup> Bowett, *supra* note 211, p 187-188.

<sup>213</sup> As example see the EEC Treaty (European Economic Community Treaty), Rome, 25 March 1957, Article 228 (2).

<sup>214</sup> Bowett, *supra* note 211, p 188.

headquarters agreements, and other UN treaties.<sup>215</sup> In all such cases the ‘binding’ character of the opinion derives from some instrument other than the opinion or the Court’s Statute. Thus, in theory, the technique could be extended by adopting more instruments incorporating this device. However, the purpose of this device is to compensate for the lack of direct standing of international organizations before the Court. It is noted by several advocates supporting the extension of the jurisdiction of the ICJ, that the problem instead should be faced directly, conferring such standing on international organizations.<sup>216</sup>

#### 6.4 The Granting of *locus standi* to International Organisations

The Court’s advisory role is significant in assisting the UN organs and agencies to decide issues with legal dimensions before them. It seems therefore that there should be no reason for the General Assembly to exercise its discretion as to who should and should not have this power. The expansion of the scope of the organs and agencies authorised by the General Assembly to request advisory opinions was considered an improvement in the early stages of the establishment of the International Court.<sup>217</sup> Accordingly, a further step should be taken to authorise all UN organs, agencies and subsidiary organs to have direct power without the need for authorisation from any other organ within the UN. This suggestion would help to avoid any disagreement regarding the right of some organs or agencies to have such a power. It might also help to avoid any possibility of revocation of this authority by the General Assembly at its discretion.<sup>218</sup>

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<sup>215</sup> As mentioned in chapter 5.1.

<sup>216</sup> Bowett, *supra* note 211, p 189.

<sup>217</sup> Amr, *supra* note 41, p 381.

<sup>218</sup> *Ibid.*



## 7 Bibliography

### 7.1 Books and Articles

- Amr, Mohamed Sameh M., *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations* (The Hague: Kluwer Law International, 2003)
- Biancchi, A., *Dismantling the Wall*, In: German Yearbook of International Law (2004) p 343.
- Bowett, D.W., *The Court's role in relation to international organizations* In: *Fifty years of the International Court of Justice, Essays in honour of Sir Robert Jennings*. Edited by Lowe and Fitzmaurice, (Cambridge: Grotius Cambridge University Press, 1996).
- Brownlie, I., *Principles of Public International Law*, (Oxford: Oxford University Press, 2003)
- Cassese, A., *International Law* (Oxford: Oxford University Press, 2005)
- Conforti, B., *The Law and Practice of the United Nations* (Leiden: Martinus Nijhoff 2005)
- Greig, D., *The Advisory Opinions of the ICJ and the Settlement of Disputes between States*, ICLQ, 15, 1966
- Hudson, M., *The Effect of Advisory Opinions of the World Court*, AJIL, 42, 1948
- Hudson, M., *The Permanent Court of International Justice 1920-1942* (New York: Macmillan 1943)
- Keith, K.J., *The Extent of the Advisory Jurisdiction of the International Court of Justice* (Leyden: A.W.Sijthoff 1971)
- Kelsen, H., *The Law of the United Nations: a critical analysis of its fundamental problems* (London: Steven & Sons 1950)
- Lauterpacht, H., *The Development of International Law by the International Court of Justice* (Cambridge: Grotius Publications 1982)
- Pomerance, M., *The Advisory Function of the International Court in the League and U.N. Eras* (Baltimore: The John Hopkins University Press 1973)
- Pratap, D., *The Advisory Jurisdiction of the International Court* (Oxford: Clarendon Press 1972)

Rosenne, S., *The Law and Practice of the International Court, 1920-1996 Volume II Jurisdiction* (The Hague: Kluwer Law International 1997)

Rosenne, S., *Rosenne's The World Court, What It is and how It works* (Leyden: Nijhoff Publishers 2003)

Rosenne, S., *The International Court of Justice: An Essay in Political and Legal Theory* (Leyden: Sijthoff 1957)

Shaw, M., *International Law* (Cambridge: Cambridge University Press, 2003)

Verhoeven, S., *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, International Law FORUM de droit international, 2004, Volume 6 pg. 106-110

## 7.2 Cases and Advisory Opinions

### 7.2.1 Cases

#### ICJ

*Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America) Judgement 27 June 1986 (ICJ Reports 1986 p 14).

*Nuclear Tests* (New Zealand v. France), Judgment 20 December 1974 (ICJ Reports 1974, p 457)

*Nuclear Tests* (Australia v. France), Judgment 20 December 1974 (ICJ Reports 1974, p 253)

*Northern Cameroons*, Judgment 2 December 1963 (ICJ Reports 1963, p 15)

*Corfu Channel*, Compensation, Judgment 15 December 1949 (ICJ Reports 1949, p 244)

*Corfu Channel*, Merits, Judgment 9 April 1949 (ICJ Reports 1949, p 4)

*Corfu Channel*, Preliminary Objection, Judgment 25 March 1948 (ICJ Reports 1947-1948, p 15)

## 7.2.2 Advisory Opinions

### PCIJ

*Status of Eastern Carelia*, 1923.07.23: Advisory Opinion No. 5 (PCIJ, Ser. B., No. 5, 1923)

*Questions relating to Settlers of German origin in Poland*, 1923.09.10: Advisory Opinion No. 5 (PCIJ, Ser. B., No. 5, 1923)

*Interpretation of the Convention between Greece and Bulgaria respecting reciprocal Emigration, signed at Neuilly-Sur-Seine on November 27<sup>th</sup>, 1919* (Question of the “Communities”). Short Title: *The Greco Bulgarian “Communities”*. 1939.07.31: Advisory Opinion No. 17 (PCIJ, Ser. B., No. 17, 1930.)

### ICJ

*Legal Consequences of the construction of a wall on the occupied Palestinian territory*, Short Title: *Wall opinion*, Advisory Opinion 9 June 2004 (ICJ Reports 2004, p 136).

*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Short Title: *Cumaraswamy case*, Advisory Opinion 29 April 1999 (ICJ Reports 1999, p 62)

*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion 8 July 1996 (ICJ Reports 1996, p 226)

*Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion 8 July 1996 (ICJ Reports 1996, p 66)

*Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Short Title: *Mazilu case*, Advisory Opinion 15 December 1989 (ICJ Reports 1989, p 177)

*Western Sahara*, Advisory Opinion 16 October 1975 (ICJ Reports 1975, p 12)

*Certain Expenses of the United Nations*, Advisory Opinion 20 July 1962 (ICJ Reports 1962, p 151)

*Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion 23 October 1956 (ICJ Reports 1956, p 77)

*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion 28 May 1951 (ICJ Reports 1951, p 15)

*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion 21 June 1971 (ICJ Reports 1971, p 16)

*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, 2nd Phase, Advisory Opinion 18 July 1950 (ICJ Reports 1950, p 221)

*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, 1st Phase, Advisory Opinion 30 March 1950 (ICJ Reports 1950, p 65)

### 7.3 Treaties

Covenant of the League of Nations, 28 June 1919

Charter of the United Nations, San Francisco, 26 June 1945

EEC Treaty (European Economic Community), Rome, 25 March 1957

Jay Treaty, 19 November 1794

Peace Treaties, Paris Peace Conference, 18 January 1919 – 21 January 1920:

Treaty of Versailles, 28 June 1919

Treaty of Saint-Germain, 10 September 1919

Treaty of Neuilly, 27 November 1919

Treaty of Trianon, 4 June, 1920

Treaty of Sèvres, August 10, 1920, subsequently revised by the:

Treaty of Lausanne, 24 July, 1923

Rules of Court, 14 April 1978

Statute of the Court, (integral part of the UN Charter), San Francisco, 26 June 1945

Treaty of Washington, Washington D.C., 8 May 1871

United States Headquarters Agreement 4 August 1947 (*Agreement between the United Nations and the United States of America Regarding the Headquarters of the United Nations*).

## 7.4 Other Documents

*A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict*, April 30 2003

Boutros-Ghali, *An agenda for Peace*, Report of the Secretary-General of the United Nations, 1992, UN Doc. A/47/277-S/24111.

General Assembly Resolution ES-10/14 of 8 December 2003

General Assembly Resolution ES-10/15 of 20 July 2004

Official document from Rolf Einar Fife, on behalf of the Norwegian Royal Ministry of Foreign Affairs, January 30, 2004

## 7.5 Online Information

*The history and function of the International Court of Justice* [online].

Based on a booklet prepared on occasion of the fiftieth anniversary of the ICJ (1946-1996): <http://www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookframepage.htm>

Dossier prepared by the Secretariat of the UN on the occasion of the advisory proceedings, available at:

[http://www.icj.cij.org/icjwww/idocket/imwp/imwppleadings/imwp\\_iFullDossier\\_20040119.pdf](http://www.icj.cij.org/icjwww/idocket/imwp/imwppleadings/imwp_iFullDossier_20040119.pdf)

[www.icj-cij.org](http://www.icj-cij.org)

[www.virtual-institute.de](http://www.virtual-institute.de)

[www.worldcourts.com/pcij/eng/](http://www.worldcourts.com/pcij/eng/)

## **8 Appendices**

### **8.1 Index**

#### **Organs and agencies entitled to ask the ICJ for an advisory opinion:**

United Nations (UN)

\*General Assembly

\*Security Council

\*Economic and Social Council

Trusteeship Council

Interim Committee of the General Assembly

\*Committee on Applications for Review of Administrative Tribunal Judgements

#### **Other Agencies:**

International Labour Organisation (ILO)

Food and Agriculture Organization of the United Nations (FAO)

\*United Nations Educational, Scientific and Cultural Organization (Unesco)

\*World Health Organization (WHO)

International Bank for Reconstruction and Development (IBRD)

International Finance Corporation (IFC)

International Development Association (IDA)

International Monetary Fund (IMF)

International Civil Aviation Organization (ICAO)

International Telecommunication Union (ITU)

World Meteorological Organization (WMO)

\*International Maritime Organization (IMO)<sup>1</sup>

World Intellectual Property Organization (WIPO)

International Fund for Agricultural Development (IFAD)

United Nations Industrial Development Organization (UNIDO)

International Atomic Energy Agency (IAEA)

\*Those organs and agencies that have asked for advisory opinions since 1946 are indicated by an asterisk.

<sup>1</sup>Previously known as the Inter-Governmental Maritime Consultative Organization (IMCO).

## 8.2 Table 1

The vertical column to the left lists the participating States and organisations that submitted written statements to the Court, prior to it delivering its advisory opinion concerning the wall built on occupied Palestinian territory.

The horizontal column indicates the reasons given by the contributing States and organisations in their written statements to the Court for their not supporting the Court in rendering an advisory opinion regarding the question of the legal consequences, regarding the question on the legal consequences of the construction of a wall built on occupied Palestinian territory.

The States and organisations are listed according to dates submitted to the ICJ. The written statements were to be submitted by January 30, 2004.

State/Organisation	Supported the Opinion	Lack of Consent	Complicate Negotiations	Lack of Facts	Lack of Useful Purpose	Propriety of the Opinion
Republic of Guinea	X					
Kingdom of Saudi Arabia	X					
The League of Arab States	X					
Arab Republic of Egypt	X					
Republic of Cameroon		X	X			
Russian Federation			X			
Australia		X	X		X	
Palestine	X					
United Nations	X					
State of Kuwait	X					
Lebanese Republic	X					
Canada			X		X	
Syrian Arab Republic	X					

State/Organisation	Supported the Opinion	Lack of Consent	Complicate Negotiations	Lack of Facts	Lack of Useful Purpose	Propriety of the Opinion
Swiss Confederation	X					
Israel		X	X	X		X
Republic of Yemen	X					
United States of America		X	X			
Kingdom of Morocco	X					
Republic of Indonesia	X					
Organization of the Islamic Conference	X					
French Republic			X			X
Italian Republic			X		X	
The Sudan	X					
Republic of South Africa	X					
Federal Republic of Germany		X	X		X	X
Japan			X		X	
Kingdom of Norway			X			
United Kingdom of Great Britain and Northern Ireland		X		X	X	
Islamic Republic of Pakistan	X					
Czech Republic	X					
Hellenic Republic			X			X
Ireland	X					
Ireland on behalf of the European Union			X			
Republic of Cyprus			X			
Federative Republic of Brazil	X					
Republic of Namibia	X					
Republic of Malta			X			
Malaysia	X					
Kingdom of the Netherlands			X			



<b>State/Organisation</b>	<b>Supported the Opinion</b>	<b>Lack of Consent</b>	<b>Complicate Negotiations</b>	<b>Lack of Facts</b>	<b>Lack of Useful Purpose</b>	<b>Propriety of the Opinion</b>
<b>Republic of Cuba</b>	X					
<b>Kingdom of Sweden</b>	X					
<b>Kingdom of Spain</b>			X			
<b>Kingdom of Belgium</b>			X		X	
<b>Republic of Palau</b>		X	X			X
<b>Federated States of Micronesia</b>		X	X			X
<b>Republic of the Marshall Islands</b>		X	X			X
<b>Republic of Senegal</b>	X					
<b>Democratic Republic of Korea</b>	X					

For more information on the content of these written statements, see:

<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>

### 8.3 Table 2

States that voted against or abstained from endorsing the ICJ advisory opinion concerning the *Legal Consequences of the Construction of a Wall built on Occupied Palestinian Territory* in GA Res. ES 10/15 of July 20 2004:

States	Voted Against	Abstained
<b>Israel</b>	X	
<b>United States of America</b>	X	
<b>Australia</b>	X	
<b>Micronesia</b>	X	
<b>Marshall Islands</b>	X	
<b>Palau</b>	X	
<b>Cameron</b>		X
<b>Canada</b>		X
<b>El Salvador</b>		X
<b>Nauru</b>		X
<b>Papuasias-New Guinea</b>		X
<b>Solomon Islands</b>		X
<b>Tonga</b>		X
<b>Uganda</b>		X
<b>Vanuatu</b>		X